was in my view sufficient compliance. The plaintiffs' first notification dated April 8, 1971 addressed to Lee Chiang Qui was not enough as it was not a notification to the defendants as provided for in the policy but the plaintiffs' written claim dated April 10, 1971 addressed to the defendants and setting out particulars of the fire and the loss or damage incurred by the plaintiffs complied with this particular condition. The plaintiffs' claim was evidently not made out in the defendants' fire claim form but this was not obligatory for nowhere was it provided in the policy that in making such a claim the defendants' form only should be used. What proved fatal to the plaintiffs' claim was the operation of the other condition referred to by Raja Abdul Aziz Addruse which was that "In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration". The fire to the insured property and in consequence the loss or damage suffered by the plaintiffs occurred on April 6, 1971. There was no pending action or arbitration within twelve months of the happening of the loss or damage so that when the plaintiffs filed their action against the defendants by writ of summons dated May 16, 1972 the defendants had ceased to be liable to the plaintiffs for any loss or damage.

In the circumstances therefore I held that the plaintiffs had failed to prove their case and I accordingly dismissed their claim against the defendants with costs.

Claim dismissed.

Solicitors: *John Ang & Co.; Rithauddeen & Aziz.*

LEE WENG SANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim Yeop A. Sani J.) January 14, 1977]
[Ipoh — Criminal Appeal No. 14 of 1976]

Criminal Law and Procedure — Re-trial — Trial de novo — Criminal Procedure Code (F.M.S. Cap. 6), s. 316(a).

Public Prosecutor — Charge — Right to amend, reduce, alter or enhance — Criminal Procedure Code (F.M.S. Cap. 6), s. 376(i).

An order of retrial would result in the trial to commence *de novo* and even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings.

Lee Teck Hock v. *Public Prosecutor*[2] dissented from.

Cases referred to:-

(1) *Lee Weng Sang* v. *Public Prosecutor* [1976] 1 M.L.J. 82.

(2) *Lee Teck Hock* v. *Public Prosecutor* [1973] 2 M.L.J. 130.

(3) *Nazimuddin* v. *Emperor* I.L.R. 40 Cal. 163.

(4) *Long bin Samat* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(5) *Nawi bin Buyong* v. *Public Prosecutor* [1936] M.L.J. 71.

(6) *Cheah Yew Fatt & Anor.* v. *Public Prosecutor* [1960] M.L.J. xlvi.

MAGISTRATES CRIMINAL APPEAL.

Paramjit Singh for the appellant.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J.: The background of this appeal is very simple. The appellant in this appeal was the same appellant in an earlier proceeding in *Lee Weng Sang* v. *Public Prosecutor*[1] when this same court ordered his convictions for offences under the Firearms (Increased Penalties) Act, 1971 and the Arms Act, 1960 (for unlawful possession of a pistol and a grenade and unlawful possession of 54 rounds of ammunitions) be quashed and that there should be a retrial. When he was produced again before the Special President following the order of retrial the prosecution applied to the court below to have the charges amended to ones under section 57(i)(a) of the Internal Security Act, 1960 carrying the death penalty. His counsel objected to the amendment of the charges but his objection was overruled. Accordingly under the Essential (Security Cases) Regulations, 1975 the appellant was committed for trial in the High Court. The appellant now appeals against the order of the learned President in allowing the amendment to the charges.

The contention of the counsel for the appellant is also simple. It is contended that by allowing the amendment to the charges before the plea was taken on the original charges the learned President had deviated from the order of retrial made by the appellate court. In other words, the amendment of the charges clearly contravened the order of retrial and this according to him vitiated the proceedings. Counsel cited *Lee Teck Hock* v. *Public Prosecutor*[2] where B.T.H. Lee J. also dealt with section 267(c) of the Sarawak Criminal Procedure Code. In that case the order of the appellate judge in the first appeal was as follows: —

"The conviction is quashed and the sentence set aside. I order a new trial before another magistrate."

The conviction concerned in that case was on a charge of driving a motor car without due care and attention. After the order of retrial the appellant was charged with two charges — the original charge and an alternative charge of driving without reasonable consideration for other persons using the road. At the retrial he was convicted of driving without due care and attention and the alternative charge was struck out at the conclusion of the defence case. It was held by the learned judge on appeal that the appellate judge in the earlier proceeding had merely ordered a new trial and it was wrong to allow the addition of an alternative charge at the commencement of the retrial.

It must first be borne in mind that in considering *Lee Teck Hock's case, supra,* the learned judge was dealing with section 267(c) of the Sarawak Criminal Procedure Code which provides that in an appeal the appellate judge may direct that further inquiry be made *or* order a new trial *on the same or an amended charge.* These last seven words are not found in the

equivalent provision of our Criminal Procedure Code which is section 316(a) which merely provides that the appellate judge may at the hearing of the appeal direct that "further inquiry be made *or* that the accused be re-tried *or* committed for trial as the case may be."

With respect however I do not think the presence or absence of those words referred to is crucial in the determination of the issue here. We have to go back to the basic concept of an order for retrial. Reference is always made to the classical case of *Nazimuddin* v. *Emperor*[3] where it has been established that when a conviction is set aside and a retrial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed. As regards the present case the order made by the appellate court in the earlier proceeding was that the case be remitted back to the Special President and the appellant be re-tried. The appellant contends that since the order was silent on the charges the retrial must following *Nazimuddin's case* be in respect of the original charges the subject of the appeal then.

The complaint is that before the plea was taken the charges were amended and in fact enhanced. At the outset I must make it clear that the issue here is not the moral question whether it was right or wrong for the prosecution to amend and enhance the charges from charges carrying a maximum sentence of fourteen years and seven years respectively to charges carrying the death penalty probably relying on the same facts. That is left to the conscience of the Public Prosecutor. But the real question is whether the prosecution was legally within their rights and powers to do so and what is the legal consequence of an order for retrial.

As regards the first question the answer is found clearly in my opinion in section 376(i) of our Criminal Procedure Code and as enunciated in *Long bin Samat* v. *Public Prosecutor*.[4] I do not think there is any doubt whatsoever that the Public Prosecutor has a right to amend, reduce, alter or enhance the charges or even to offer no evidence at any stage before judgment in a criminal proceeding. I will not therefore labour on this point. *Nazimuddin's case*[3] should not in my view be regarded as an authority for taking away the powers of the Public Prosecutor in a criminal proceeding.

As regards the second question the F.M.S. Appellate Court in the case of *Nawi bin Buyong* v. *Public Prosecutor*[5] unanimously agreed that there should be a retrial. In that case it was found, among other things, that there was an absence of a proper direction to the assessors by the trial judge and it was held that the proper order to make was an order of retrial on the original charges. Cussen J., held in that appeal that such an order of retrial, unless so expressly limited, is an order to re-try on the original charges. The first trial would be set aside and cancelled and the proceedings would commence *de novo* with the original charges, unless the prosecution decides at the retrial to proceed on a reduced charge.

Among the notes in the [1960] M.L.J. xlvi there is also a reference to the case of *Cheah Yew Fatt & Anor.* v. *Public Prosecutor*[6] where it was held that where a person was convicted on a charge which disclosed no offence, the trial was a nullity and there should be an order for retrial but not on the same charge. All that the court should do was to quash the conviction and leave it to the Public Prosecutor to bring an appropriate charge in his discretion.

I do not think there is any conflict between these authorities and what I have said earlier on the powers of the Public Prosecutor by virtue of section 376(i) of our Criminal Procedure Code. To sum up, an order of retrial would result in the trial to commence *de novo* and it is my opinion that even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings. It is on this point that I have, with respect, to disagree with the conclusion in *Lee Teck Hock's case*.[2]

The second and only other ground of the appeal is that the amended charges "would unfairly and gravely prejudice the fair trial of the appellant." I am not certain whether counsel meant the amended charges are in themselves unfair or prejudicial or whether the amended charges had brought into motion a new set of procedure which is unfair or prejudicial to the appellant as an accused. In any case this ground was not argued one way or another and as far as I can see it is also without merit.

For all the above reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Paramjit Singh & Co.*

PUBLIC PROSECUTOR v. CHAI YEE KEN

[O.Cr.J. (Abdul Hamid J.) January 24, 1977]

[Kuala Lumpur — Federal Territory Criminal Trial No. 24 of 1976]

Criminal Law and Procedure — Attorney-General — Prosecution by — Grounds for — Discretion — Not open to court to inquire — Internal Security Act No. 82 ss. 47 and 57.

Arms and Ammunition — Possession — Internal Security Act No. 82, s. 57(1)(a) & (b).

It is not open to the court to inquire into the grounds for the Attorney-General's decision to prosecute the accused under section 47 of the Internal Security Act, nor is it open to the court to inquire into the merit of the exercise by the Attorney-General of his discretion. It is also not the duty of the prosecution to prove that the arms would be used for the purposes stated in the preamble of the Internal Security Act.

Cases referred to:-

(1) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.

(2) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

CRIMINAL TRIAL.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the Public Prosecutor.